DR SHAFIE ABU BAKAR

v.

PEGAWAI PENGURUS PILIHANRAYA N 26 BANGI & ORS AND OTHER PETITIONS

HIGH COURT MALAYA, SHAH ALAM
VT SINGHAM J
[ELECTION PETITION NOS: 1-2004, 2-2004 & 3-2004]
29 JULY 2004

ELECTION: *Petition - Challenge to validity of election candidate - Preliminary objections - Whether petitioners complied with mandatory requirements of election petition - Whether results of election affected - Election Offences Act 1954, s. 32(e) - Election Petition Rules 1954, rr. 3(1), 4(1)*

These were election petitions by the 1st, 2nd and 3rd petitioners praying for determination by the court that the 3rd respondents in the respective petitions, the returned candidates, were not duly elected and/or returned, and that the election was void. The petitioners submitted various allegations against the respondents; the respondents, however, raised several preliminary objections, all of them relating to non-compliance with the mandatory requirements of the Election Offences Act 1954 ('the Act') and the Election Petition Rules 1954 ('the Rules') in the manner of drafting and presentation of the petitions, and requested the court to invoke its inherent power to strike out the petitions. The 2nd respondent in the 1st petition and the 1st and 2nd respondents in the 2nd and 3rd petitions respectively also contended that the petitioners failed to comply with the mandatory requirements of r. 3(1) of the Rules as they had failed to leave two copies of the petition with the Registrar's office at the time of its presentation. In support of this objection, the respondent's had filed two affidavits but had not received any affidavit in reply from the petitioners.

Held (allowing the preliminary objections and dismissing the petitions):

[1] Although r. 4 of the Rules merely provides for the general mandatory requirements of pleadings of an election petition, the facts and grounds to be stated in the petition must comply with the specific requirements of s. 32 of the Act. Failure to adhere to the requirements of s. 32 of the Act would render the petition defective. (p 368 c-d)

[2] On the facts, it was clear that all the petitions, where it was grounded on s. 32(e) of the Act, either clearly lacked facts and particulars to support the fact of disqualification or in some cases failed to furnish any facts at all to sustain the fact of disqualification as required by the mandatory provisions of r. 4(1) of the Rules read with s. 32(e) of the Act. (p 383 d-e)

[3] It was incumbent upon the petitioners to reply to the affidavits filed on behalf of the respondents and failure to controvert specifically the factual averments in the said affidavits, which had been raised as a ground for the preliminary objection, and failing to comply both must operate to the detriment of, and was deemed acceptance by, the petitioners. Hence, it was clear that the petitioners had failed to leave two copies of the petitions at the Registry as required mandatorily by r. 3(1) of the Rules. (p 385 b-c)

[4] Mere transgressions of the election laws do not necessarily affect the results of the election. The petitioner has to proceed a step further and comply with the mandatory statutory requirement and demonstrate how the transgression of the election laws has affected the result of the election. In the instant case, the petitioners had failed to do as such. (p 385 f-g)

Case(s) referred to:

Abdul Rahman Ghazali v. Annuar Musa & Satu Lagi (PP 33-7-95) (Unreported) ***(foll)***

Albert Joseph Arzu v. Allan Edmund Arthurs & Anor [1965] 1 WLR 675 ***(foll)***

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(foll)***

Ang Thye Chin v. Chua Kow & Ors [1996] 1 CLJ 49 HC ***(foll)***

Bhikaji Keshao Joshi v. Brijlal Nandlal Biyani 10 ELR 358 (SC) ***(foll)***

Bong Geok Beng v. Ahmad Nordin Mohamed Amin & Anor [1980] 1 MLJ 167 ***(foll)***

CH Subbarao v. Member, Election Tribunal, Hyderabad And Others AIR [1964] SC 1027 ***(foll)***

Chong Thain Vun v. Watson & Anor Hamid Datun v. Majanggil & Anor Richard E Yap v. Tun Datu Mustapha Datu Harun [1968] 1 MLJ 65 ***(foll)***

Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 ***(foll)***

Dr Lee Chong Meng v. Abdul Rahman Hj Abdullah, Returning Officer & Ors (No 2) [2000] 3 CLJ 519 HC ***(foll)***

Gill v. Reed & Holmes [1874] 31 LT 69 ***(refd)***

Gunn v. Sharpe [1974] 2 All ER 1058 ***(refd)***

Gurdial Singh Nijar v. KS Balakrishnan [1993] 2 CLJ 75 HC ***(foll)***

Hamad Mat Noor v. Tengku Sri Paduka Raja Ibrahim Ismail & Ors [1993] 4 CLJ 135 HC ***(foll)***

Hansen v. Australian Electoral Commission [2000] FCA 606 ***(refd)***

Harcharan Singh v. Mohinder Singh AIR [1968] SC 1500 ***(refd)***
Hardwari Lal v. Kerwal Singh AIR [1972] SC 515 ***(refd)***
Hari Das v. Hira Singh Pal 4 ELR 466 ***(foll)***
Harish Chandra Bajpai v. Triloki Singh, 12 Election Laws Reports 461; AIR [1957] SC 444 ***(foll)***
Harris Mohd Saleh v. Ismail Majin, Returning Officer [2000] 4 CLJ 104 HC ***(not foll)***
Hibbard v. Tupper Russ ER Z 61 (CAN) ***(refd)***
Hugh Siak Meng & Anor v. Daing Ibrahim [1975] 4 MC 275 ***(refd)***
Isahak Hamid v. Mustapha [1965] 2 MLJ 18 ***(foll)***
J Devaiah v. Nagappa AIR [1965] Mysore 102 ***(refd)***
Keshav Prasad v. AD Mani [1961] DEC 133 (MPHC) ***(foll)***
KTK Thangamani & Anor v. The Chief Secretary, Government Of Madras & Anor AIR [1965] Madras 225 ***(refd)***
Lee Hie Kui v. Song Swee Guan & Anor [1998] 1 CLJ Supp 191 HC ***(refd)***
Leonard v. Nachiappa Chetty [1923] 4 FMSLR 225 ***(refd)***
Manubhai Nandlal Amersey v. Popotlal Manilal Joshi [1968] 3 SCR 217 ***(refd)***
Minister Of Labour, Malaysia v. Chan Meng Yuen & Another Appeal [1992] 2 MLJ 337 ***(foll)***
Mohamad Hanafi Seman v. Wan Othman Wan Yusoff & Ors [2000] 3 CLJ 811 HC ***(foll)***
Mohamed Jaafar v. Sulaiman & Anor [1970] 1 MLJ 18 ***(foll)***
Moinuddin B Harris v. BP Divgi ELR ***(foll)***
Muip Taib v. Dato' James Wong, Wan Hamid Tuanku Surur v. Francis Loke [1971] 1 MLJ 246 ***(foll)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(foll)***
Norbert Choong Kai Chong & Anor v. Mohamed Idris Hj Ibrahim & Anor [1980] 1 MLJ 316 ***(foll)***
Overseas Investment Pte Ltd v. Anthony William O'brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(foll)***
Patau Rubis v. Patrick Anek Uren & Anor [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348 HC ***(foll)***
Phillips v. Phillips & Ors [1878] Vol IV QBD 127 ***(refd)***
Ponnuswami v. Returning Officer, Nammakkal Constituency [1952] SCR 218 ***(refd)***
PP v. Anthony Wee Boon Chye & Anor [1965] 31 MLJ 189 ***(refd)***
Raja Ahmad Raja Sulaiman v. Hj Mohd Daud Ja'afar & Anor (Election Petition No: 33-3-1995) (Unreported) ***(refd)***
Ram Abhilakh Tewari v. The Election Tribunal, Gonda & Ors AIR [1958] All 663 ***(refd)***
Ramely Mansor v. Suruhanjaya Pilihanraya Malaysia & Ors [2000] 6 CLJ 56 HC ***(foll)***
Re Pengkalan Kota Bye-election Teoh Teik Huat v. Lim Kean Siew & Anor [1981] 1 MLJ 265 ***(refd)***

Richard Yap v. Mustapha [1968] 1 MLJ 159 ***(foll)***
Samant N Balakrishna v. George Fernandez & Ors AIR [1969] SC 1201 ***(refd)***
Savithri Devi v. Prabhawathi Misra 15 ELR 358 (All) ***(refd)***
Senanayake v. Navaratne [1954] AC 640 ***(refd)***
Singh Ram & Anor v. Duli Chand & Anor DEC ***(refd)***
Tengku Korish v. Mohamed Jusoh & Anor [1970] 1 MLJ 6 ***(foll)***
United Malayan Insurance Bhd v. Paul Ng Chai Khoon [1992] 4 CLJ 2055; [1992] 3 CLJ (Rep) 753 HC ***(foll)***
Wan Daud Wan Jusoh v. Mohamed Hj Ali & Anor; Daud Jusoh v. Annuar Hj Musa & Anor; Mohd Nor Ismail v. Mohd Zain Abdullah & Anor [1988] 2 MLJ 384 ***(not foll)***
Willians v. The Mayor Of Tenby & Ors [1879-80] 5 CPD 135 ***(foll)***
Wong Sing Nang v. Tiong Thai King [1996] 4 MLJ 261 ***(foll)***
Zulkarnaini Mohamed Noor v. Syed Omar Mohamed & Anor [1979] 2 MLJ 143 ***(foll)***

Legislation referred to:

Conduct of Election (Registration of Voters) Regulations 2002, reg. 12
Elections (Conduct of Elections) Regulations 1981, regs. 3(3), (5), 11(5), 14A, 17, 19(2), (3)
Election Offences Act 1954, ss. 4A, 4(g), 5(2), (3), 9, 10, 11(1)(d), (e), 32(a), (b), (c), (e), 35A, 36(2), 38(1)
Election Petition Rules 1954, rr. 3(1), 4(1)(b), (3), (4), 5, 15
Federal Constitution, arts. 48, 118, 132, 160, s. 6(1)(c) of Eight Schedule
Interpretation Acts 1948 and 1967, s. 62
Rules of the High Court 1980, O. 18 r. 19
Selangor State Constitution 1959, art. 64(1)(c)

Representation of the People Act 1951 [Ind], s. 83

For the petitioners - Mohamed Hanipa Maidin (Mohd Khairuddin Othman, Ahmad Lutfi Awang, Muhammad Firdaus Zakaria & Nurul Iman Dzulkefly); M/s MK Othman & Co
For the 1st & 2nd respondents - Abdul Gani Patail AG's Chamber (Zaitun Zawiyah Puteh SGM, Azahar Mohamed SFC, Azizah Nawawi SFC, Junaidah Rahman FC & Normastura Ayub FC)
For the 3rd respondent - Azhar Azizan Harun; M/s Kaushalya Rajathurai & M/s Shafee & Co

Reported by Suresh Nathan

JUDGMENT

VT Singham J:

This is an election petition by Dr. Shafie bin Abu Bakar, first petitioner, who was a candidate duly nominated to contest the election for the Selangor State constituency of N. 26 Bangi (petition 1"); En. Hasan bin Mohamed Ali, second petitioner, a candidate duly nominated to contest the election for the Selangor State Constituency of N. 8 Sungai Burung ("petition 2") and En. Abdul Ghani bin Samsudin, third petitioner, a candidate duly nominated to contest the election for the Selangor Parliamentary Constituency of P. 95 Tanjong Karang ("petition 3"). The respondents to all the petitions are the Returning Officer ("first respondent"), the Election Commission ("second respondent") and the Returned candidate ("third respondent") in each of the abovenamed Constituency respectively. For reasons I have alluded to earlier in my ruling on 29 June 2004 in respect of the Notice of Motion (encl. 8), the first respondent in Petition 1 is no longer a party in the said petition and any reference to respondents in Petition 1 must necessarily refer to the second and third respondents only.

In para. 2 of all the petitions it is stated that the election was held on 21 March 2004. The result for the respective constituency was gazetted on 12 April 2004. Before I proceed to consider the preliminary objections raised by the respondents at the outset it is appropriate for me to state that the first petitioner's application to serve the petition on the first respondent outside the time stipulated for the service of the same in Petition 1 was dismissed on 29 June 2004 for reasons stated in my oral judgment which contains my grounds.

Under s. 38(1) of the Election Offences Act 1954 save where proviso (a) or (b) applies, an election petition shall be presented within 21 days of the date of publication of the result of the election in the Gazette. (see art. 118 of the Federal Constitution). Under r. 15 of the Election Petition Rules 1954, notice of the petition, accompanied by a copy thereof, shall, within 15 days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering personally the notice and a copy of the petition to the respondent or by sending the same by prepaid registered post addressed to the respondent at his usual or last known place of residence or business or by posting a notice on the notice board of the High Court in the State in which that constituency or electoral ward is situated and by publishing a notice in a national language newspaper and in any other newspaper circulating within the constituency or electoral ward or in which the election was held stating that such petition has been presented and a copy of the petition may be obtained by the respondent free of charge on application at the office of the registrar.

I shall now deal with the various allegations as set out by the petitioners in their petitions, all three petitions allege that the second respondent had illegally extended the polling time in contravention of regs. 11(5) and 3(5) of the Elections (Conduct of Elections) Regulations 1981 and that the third respondents were at the time of their election persons disqualified for election, pursuant to s. 6(1)(c) of the Eighth Schedule of the Federal Constitution and art. 64(1)(c) of the Selangor State Constitution.

The petitioners in Petitions 2 and 3 separately allege that the first and second respondents did not comply with reg. 14A of the Elections (Conduct of Elections) Regulations 1981 which concerns the use of an authoritative text of electoral rolls. Additionally, Petitions 1 and 3 also set out other grounds to avoid the election. For ease of reference, I have enumerated these grounds in the order in which the petitions are presented. Before I proceed to deal with the preliminary objections raised by the Honourable Attorney General for the second respondent in Petition 1 and for the second and third respondents in Petitions 2 and 3 and supported by the learned counsel for the third respondent in all the three petitions, it is useful to consider the law that is applicable to an election petition in this jurisdiction.

In Malaysia, where a person is declared elected to either House of Parliament or to the Legislative Assembly of a State may be challenged or questioned by way of an election petition and the law applicable would be the Election Laws and not the common law or equity. Election Law is a special law and there is no place for consideration of equity or common law and it is wholly a statutory proceeding. In *CH Subbarao v. Member, Election Tribunal, Hyderabad And Others* AIR [1964] SC 1027, Ayyangar J said:

> An election petition is not to be equated to an election at law or in equity, but as the rights are purely the creature of statute, if the statute renders any particular requirement mandatory, the courts possess and can exercise no dispensing power to waive non-compliance.

In *Tengku Korish v. Mohamed bin Jusoh & Anor.* [1970] 1 MLJ 6 at p. 6, His Lordship Raja Azlan Shah J (as His Highness then was) said:

> It is well recognised that I must not go outside the province of the election law. The Election Offences Act 1954 confers certain rights and provides a remedy for enforcing those rights. Where that is the case, the remedy provided by that statute only must be availed of. Wills J stated this rule with great clarity in *Wolverhampton New Waterworks Company v. Hawkesford* in the following passage:

> There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, *viz.*, where a liability not existing at common law is existed by a statute which at the same time gives a special and particular remedy for enforcing it … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The present cases falls within the latter class.

The rule cited in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Ltd.* and has been reaffirmed by the Privy Council in *Attorney-general of Trinidad and Tobago v. Gordon Grant & Company*.

What "right" does the Election Offences Act 1954 confer, using the word "right" in its broad sense? In my judgment, the right conferred by that Act is a special kind of right unknown to the common law or equity, and the court which administers it possesses a special kind of jurisdiction (see *Theberge v. Laundry, Goonesinha v. Hon. C.I. de Kretser* or what is said in *Arzu v. Arthur* as a peculiar jurisdiction). It is not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it (see *Ponnuswami v. Returning Officer, Nammakkal Constituency & Ors.*).

The statutory requirements of election law are mandatory and must be strictly observed: see *Devan Nair v. Yong Kuan Teik, Harcharan Singh v. Mohinder Singh* and *Chong Thain Vun v. Watson & Anor.*

In *Mohamad Hanafi bin Seman v. Wan Othman bin Wan Yusoff & Ors* [2000] 3 CLJ 811 at p. 824, His Lordship Zulkefli J said:

> Saya ingin menyatakan di sini bahawa kehendak statutori sesuatu petisyen pilihanraya hendaklah dipatuhi dengan ketat dan sepenuhnya kerana pertikaian pilihanraya adalah suatu prosiding statutori yang khas serta khusus dan yang asing kepada undang-undang Common Law ataupun ekuiti.

Similarly, a petitioner or a respondent in an election petition must observe strictly the requirements of the election law and abstain from seeking guidance as in civil suits where a liberal interpretation of the procedure law is given. An election petition must contain a concise statement of the material facts on which the petition is grounded and shall set forth full particulars of the allegation thereof. In other words, the petitioner must state his case with clarity and precision so that the respondents may know for certain what is the real complaint in dispute and enable them to prepare their case for the trial and that they are not taken by surprise. (see *Bhikaji Keshao Joshi v. Brijlal Nandlal Biyani* 10 ELR 357 (SC)).

In *Hari Das v. Hira Singh Pal* 4 ELR 466 the following observation of the Election Tribunal were made:

> Law reports on election cases, both in India and England are replete with cases, where election petitions have failed on account of their defective drafting. It is a sad commentary on the legal profession that a large number of election petitions should be dismissed, or some paragraphs of the petition be struck off for haphazard drafting. Election law is a special law and a specialized knowledge is required to bear upon the subject. If he fails in this sacred duty cast upon him by the tradition of his noble profession, the case of his client suffers and there is consequent miscarriage of justice, because the acts constituting corrupt practices cannot be investigated by the Election Tribunals. Trial of an election petition, is not a contest between two contending parties but is a public inquiry into the corrupt and illegal practices by a candidate. The inquiry is held on high public policy. The over-riding consideration is to vouchsafe the free nature and purity of elections. This is also the controlling purpose of the Representation of the People Act. It is the duty of the lawyer to be thoroughly conversant with the election law, and avoid drafting the petition in careless and casual manner. It is perfectly true that some defects cannot entirely be eliminated even by the most skilful, but, on the other hand, a larger number of them arise from perfectly avoidable slipshodness and want of precision in thought, legal knowledge and expression. Hence scrupulous and meticulous care is needed in drafting election petitions.

In *Keshav Prasad v. AD Mani* [1961] DEC 133 (MPHC), the High Court of Madhya Pradesh explained that:

> The object of the rules evidently is that the parties who come to try an election petition and defend the seat, shall not have matters sprung upon them in such a way as to embarrass them with the answer they give and it is clear that it would embarrass the returned candidate very much if he were to have charges of corrupt practices sprung upon him at the last moment, but particulars have of course to be given to the extent to which they can reasonably be given in the special circumstances of each case. The rules thus guard on the one hand

against sudden surprise as also excessive expense on account of the particulars being inadequate, but at the same time they do not on the other hand require that the particulars should disclose his entire evidence in the lists amplifying the charges in the petition. As was held in *Beverley*, 1916 (1 O' M & H p.147) – "the particular is not to limit the witnesses who are called, but merely to limit the acts which are relied upon for the purposes of unseating the respondent," (Hissar North G. l938). "The persons presenting an election petition are bound to tell the most they can at the time these particulars are given, and, at all events before the trial, to tell as much as they can to put the sitting member and his counsel upon enquiry and to prevent surprise or expense." (Saharanpore (N M R) l920]. "The allegation of a corrupt practice is a quasi-criminal charge and it is but right that respondent ought to know at the earliest possible moment the exact charges which he is called upon to meet and the element of surprise and harassment must be avoided." (Ambala North Sikh, l946). In Calcutta North M U l937 it was observed: "In providing that the original petition shall set out the material facts upon which the petitioner relies together with full particulars of any corrupt practice which he alleges, the intention of the framers of the 'Election Petition Rules' was obviously to ensure that the petition should be a bona fide petition based upon specific instances of corrupt or improper conduct on the part of the respondent, which the petitioner would be able to establish by evidence available to him at the time of the presentation of the petition, that the offences charged should be clearly identified and that the respondent should have reasonable notice of the charges that he would be called upon to meet. In our view particulars which are insufficient for the purpose of satisfying this test cannot be regarded as full particulars …" As to what particulars are to be given must depend on the facts of each case. But each party must state his case with clarity and precision, so that his opponent may know for certain what is the real point in dispute. Having regard to the object in view it follows that the details should be sufficient to enable the opposite party to prepare his case for the trial so that he may not be taken by surprise. In *Bhikaji Keshao Joshi v. Brijlal Nandlal Biyani* the Supreme Court observed: "There can be no reasonable doubt that the requirement of full particulars is one that has got to be complied with, with sufficient fullness and clarification so as to enable the opposite party fairly to meet them and they must be such as not to turn the enquiry before the Tribunal into a rembling and roving inquisition. (see *HV Kamath v. Election Tribunal* AIR [1958] MP 168).

In Petition 1, it is alleged that:

(1) The second respondent failed to maintain secrecy of voting and thereby contravened ss. 4(g), 5(2) and (3) of the Election Offences Act 1954 and regs. 17, 19(2) and (3) of the Elections (Conduct of Elections) Regulations 1981.

(2) The second respondent failed to comply with reg. 17 of the Elections (Conduct of Elections) Regulations 1981 which concerns with the format of the ballot paper.

(3) The third respondent had during the election promoted feelings of ill will and hostility and thereby contravened s. 4A of the Election Offences Act 1954.

(4) The third respondent had during the election made and published false statement of fact by using the title "Professor" and thereby contravened s. 11(1)(d) and (e) of the Election Offences Act 1954.

In Petition 3, it is alleged that:

(1) The second respondent contravened reg. 12 Conduct of Election (Registration of Voters) Regulations 2002 when they transferred voters without consent.

(2) The third respondent had during the election violated s. 4A of the Election Offences Act 1954 by promoting feelings of ill will and hostility, s. 9 of the Election Offences Act 1954 by exerting undue influence and committed act of bribery contrary to s. 10 of the Election Offences Act 1954.

On the application of all parties and pursuant to r. 6 of the Election Petition Rules 1954 all the three petitions were dealt with together as one petition wherever the issues raised in the petitions were substantially identical and common. Save where the issues raised differ and distinct from the other I will endeavour to deal with it separately respecting that petition.

A perusal of all the petitions evince that the petitioners are relying on s. 32 of the Election Offences Act 1954, particularly, provisos (a), (b), (c) and (e) as a means to justify the avoidance of the respective elections. I will deal with these provisos and its requirements later on in the judgment. All the petitioners conclude their petitions with a prayer that it may be determined that (i) Amran bin Kasimin (third respondent in Petition 1), (ii) Mohd Shamsudin bin Lias (third respondent in Petition 2) and (iii) Dato' Noh bin Omar (third respondent in Petition 3) were not duly elected and/or returned and that the election was void.

On the day fixed for hearing of the said petitions, the respondents on their part raised several preliminary objections and invited me to invoke the courts inherent power to strike out the said petitions. However, the petitioners' counsel En. Mohamed Hanipa bin Maidin requested the court to defer its decision on the preliminary objection until and after the completion of the full trial of the petitions and the decision of the court.

For ease of reference, I set out hereinbelow numerically the grounds of preliminary objections advanced by the respondents which *inter alia* are as follows:

(1) The petitions failed to satisfy the mandatory requirements of r. 4(1)(b) of the Election Petition Rules 1954 read together with s. 32(b) of the Election Offences Act 1954 in that they failed to state the facts and grounds alleging that the non-compliance with the provisions of any written law relating to the conduct of any election affected the result of the election.

(2) The petitions failed to comply with the mandatory requirements of r. 4(1)(b) of the Election Petition Rules 1954 read together with s. 32(a) and (c) of the Election Offences Act 1954.

(3) The petitions do not satisfy the mandatory requirement of r. (4)(1)(b) of the Election Petition Rules 1954 read together with s. 32(e) of the Election Offences Act 1954 in that it failed to state facts and grounds to show that the third respondent in all the petitions were at the time of their election persons disqualified for election.

I decided not to hear oral evidence as the preliminary objection relates to the non-compliance with the mandatory requirements of the Election Offences Act 1954 and the Election Petitions Rules 1954 in the manner of drafting and presentation of the petitions. It is sufficient for me to say that if the respondents fail in their application on the preliminary objection to dismiss or to strike out the petitions, then *ex necessitate* I will have to deal with the merits of the grounds advanced by the petitioners. On the other hand, if the respondents succeed that would certainly put an end to the whole matter saving considerable time and expense for all parties concerned. Preliminary objections are generally confined to legal objections to the form and substance of the petition and the objection which if is sustained would render useless the necessity of inquiring into the merits. It was therefore urged upon the court in a summary manner to prevent the necessity and to avoid the expense attending a protracted trial (see *Hibbard v. Tupper Russ ER* Z 61 (CAN)). I am of the view that there are two circumstances where an election Judge shall decide an election petition, namely:

(i) where the pleadings in the petition on *prima facie* is insufficient to satisfy the requirements of proper particularization and it is not shown in the pleadings how the allegations as pleaded has affected the result of the election and where any further proceeding by way of a trial or recording evidence would be an exercise in futility, the election judge may in its discretion decide the petition to its conclusion at the outset of the hearing

on the preliminary objection raised by the respondents on the ground that the petition cannot be sustained in law as it lacks material particulars and ought to struck out; or

(ii) where all the witnesses are called to testify and evidence has been given in respect of the allegations as pleaded in the petition and upon completion of the trial.

In the instant case, since the respondents have raised preliminary objections at the outset of the hearing of the petition on the pleadings itself, I am of the view that I have the discretion to decide the petition at this stage of the proceedings if it warrants to strike out or dismiss the petition. In the circumstances, I rejected the application of learned counsel for the petitioners to defer my decision on the preliminary objection until the witnesses have testified and upon completion of a full trial of the petition. I had ruled that my decision will be given at the conclusion of the preliminary objection as it is meaningless to defer my decision if I find that the grounds raised by way of preliminary objection is sufficient to dismiss or strike out the petitions. I am also mindful of the decision in *Norbert Choong Kai Chong & Anor v. Mohamed Idris Bin Haji Ibrahim & Anor* [1980] 1 MLJ 316 where it was held that objection to election petitions are issues of law which should be disposed of as preliminary issues. Further more, I am of the view that the peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the petition and the representation in either House of Parliament or the Legislative Assembly of the State Constituency affected enables election judge to determine the petition to its finality on procedural evince the hearing every matters itself. (see *Senanayake v. Navaratne* [1954] AC 640).

The new s. 35A of the Election Offences Act 1954 which came into effect on 16 January 2003 by Act A 1177/02 that election petition shall be completed not later than six months from the date of the presentation of the election petition evince an intention and places importance that both Parliamentary and State Election that there shall be a quick decision as to who shall be entitled to sit as an elected representative of the voters as delay would create doubt and difficulties in administrations. In *Albert Joseph Arzu v. Allan Edmund Arthurs & Anor* [1965] 1 WLR 675, the Privy Council had also held that in the exercise of the peculiar jurisdiction a dismissal of the petitions based on a procedural matter is nonetheless a decision in an election petition even where the matter had not proceeded to the hearing of evidence. In *Albert Joseph Arzu v. Allan Edmund Arthurs And Another* [1965] 1 WLR 675 at p. 679, Lord Morris of Borth-y-Gest for the Privy Council said:

> The fact that no evidence has been heard does not affect the general principle. The court in the present case did not refuse jurisdiction; it decided in its peculiar jurisdiction that the petitions were defective. As a result the petitions were dismissed. A dismissal based on a procedural matter is none the less a decision in an election petition, even where the matter has not proceeded to the hearing of evidence.

On the other hand, I am mindful that it does not mean that expeditious disposal of election petitions must rushed the healing like an express or courier service as if that were the case it will defeat the whole purpose and exercise of this special jurisdiction and the special procedure and limitation of its own. In *CH. Subbarao v. Member, Election Tribunal, Hyderabad And Others* AIR [1964] SC 1027 at p. 1032, Ayyangar J for the Supreme Court said:

> … While we are conscious of the need for expeditious disposal of election petitions, and for the strict enforcement of provisions designed to achieve this purpose, we cannot be oblivious to the circumstance that to read every requirement literally might equally defeat the purpose for which Part VI is intended *viz.*, that elections are conducted in accordance with the relevant statutory provisions framed to ensure purity and orderliness and that the candidate who has not obtained a majority of valid votes or has obtained it in flagrant breach of the statutory provisions is not held entitled, to represent the constituency.

In *Muip bin Taib v. Dato James Wong; Wan Hamid bin Tuanku Surur v. Francis Loke* [1971] 1 MLJ 246 at p. 249, His Lordship B.T.H. Lee J said:

> Also in the Privy Council case of *Joseph Theberge and Another v. Philippe Laudry Lord Cairns* said in respect of the Quebec Elections Acts as follows:
>
> > These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. *A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known.* (emphasis by this court)

On the question of "peculiar jurisdiction", reference may be made to the judgment of the Privy Council in the case of *Arzu v. Arthurs* an election matter.

Lord Peace in his judgment said at page 679:

> If the decision in this peculiar jurisdiction is to be final such finality must apply irrespective of the reasons for the decision. The fact that no evidence has been heard does not affect the general principle. The court in the present case did not refuse jurisdiction; it decided in its peculiar jurisdiction that the petitions were defective. (emphasis by this court)

I have also adopted this course in the light of the entrenched and special power imbued to an election judge. The jurisdiction of the election judge to hear election petition is a creature of statute and judges are especially bound to keep themselves strictly within the letter of the Acts, and to abstain from any attempt to strain the law. For this reason the statutory requirements of election law must be strictly observed. The purity of the election process must be properly safeguarded and it must manifestly and undoubtedly be seen that the people are not elected by flagrant breaches of the law, corrupt and/or illegal practices. (see *Richard Yap v. Mustapha* [1968] 1 MLJ 159). Judges who have heard and decided election petitions have described this jurisdiction as a peculiar jurisdiction. Touching on the jurisdiction of the court and the right to petition His Lordship Raja Azlan Shah J (as His Highness then was) in *Tengku Korish v. Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6 at p. 7 said:

> What 'right' does the Election Offences Act, 1954, confer, using the word 'right' in its broad sense? In my judgment, the right conferred by that Act is a special kind of right unknown to the common Law or equity, and the Court which administers it possesses a special kind of jurisdiction (see *Theberge v. Laudry), Goonesinha v. Hon. C.I de Kretsor*) or what is said in Arzu) as a peculiar jurisdiction). It is not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it (see *Ponnuswami v. Returning Officer, Nammakal Constituency & Ors*).

In exercising this special jurisdiction, the election judge has the inherent power to dismiss or strike out petitions which are defective. (see *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261; *Patau Rubis @ Dr. Patau Rubis v. Patrick Anek Uren & Anor* [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348). However, the Rules of High Court 1980, particularly, the summary process to strike out under O. 18 r. 19 cannot be resorted to for this purpose. I can do no better than to adopt the entire reasoning of His Lordship Augustine Paul J (now Judge of the Court of Appeal) in *Dr Lee Chong Meng v. Abdul Rahman bin Hj. Abdullah, Returning Officer* [2000] 3 CLJ 519 on the matter concerning the application of the Rules of the High Court 1980. For that same reason

and with respect, I am not inclined to follow the approach adopted by His Lordship Muhammad Kamil J in *Harris Mohd Saleh v. Ismail bin Majin, Returning Officer* [2000] 4 CLJ 104. Therefore, it has been well established that the statutory requirements of the election laws must be strictly observed because an election dispute is a statutory proceeding unknown to the common law or equity. In fact the courts have frequently held with considerable force that the provisions of an election law are peremptory and the terms and conditions must be complied with before a petition could be presented. (see *Willians v. The Mayor Of Tenby & Ors* [1879-80] 5 CPD 135; *Dr Lee Chong Meng v. Abdul Rahman bin Hj. Abdullah, Returning Officer* [2000] 3 CLJ 519; *Ponnuswami v. Returning Officer, Nammakkal Constituency* [1952] SCR 218; *Harcharan Singh v. Mohinder Singh* AIR [1968] SC 1500; *Tengku Korish v. Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6; *Hugh Siak Meng & Anor v. Daing Ibrahim* [1975] 4 MC 275 and *Ramely bin Mansor v. Suruhanjaya Pilihanraya Malaysia & Ors* [2000] 6 CLJ 56).

Election petitions were considered to be defective where there was non-compliance with the mandatory requirements of the Election Offences Act 1954 and the Election Petition Rules 1954 especially by those who are dealing with the drafting and presentation of the petitions. (see *Patau Rubis @ Dr. Patau Rubis v. Patrick Anek Uren & Anor* [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348). Non-compliance with the mandatory provisions of the election law must necessarily result in a jurisdictional defect and the court has no power to entertain the petition. (see *Chong Thain Vun v. Watson & Anor Hamid Datun v. Majanggil & Anor Richard E. Yap v. Tun Datu Mustapha bin Datu Harun* [1968] 1 MLJ 65). It is therefore important that the petitioner gives detail particulars in the petition at the outset not just and merely on matters which he must prove to get his petition up and running, but he must also plead and show how those allegations some of which if it is proved will affect the result of the election. I am not willing to compromise or give leeway to this legal requirement as envisaged and intended by the legislature by the express and clear language in the statute.

As the respondents' preliminary objections relates to non-compliance of mandatory provision of the election law I am therefore seized with the jurisdiction and power to dismiss and/or strike out the petitions if I am convinced by the respondents argument that the petitioners failed to comply with the mandatory provisions of the election law dealing with drafting and presentation of their petitions. In other words, the power of dismissal of the petition can only be exercised if there is non-compliance with a mandatory provision of the election law dealing with the drafting and presentation of petitions. Therefore, I have to first consider whether the requirements of

r. 4(1) of the Election Petition Rules 1954 and s. 32 of the Election Offences Act 1954 are mandatory or merely directory. There are several cases which are clear and consistent which have been relied on by the Honourable Attorney General for the second respondent in Petition 1 and the first and second respondents in Petitions 2 and 3 and the third respondent's counsel in which our courts have laid down guidelines as to how the matter should be treated, such as the present, and I will allude to these cases. But before I do so, it may be convenient for ease of reference to set out the provisions of the election law under which the petitions are moved insofar as they are relevant on this point.

Section 32 of the Election Offences Act 1954 specifies five grounds on or under which an election may be declared void by an election petition. Section 32 reads as follows:

> 32. The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> (a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;
>
> (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;
>
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;
>
> (d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement being convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or
>
> (e) that the candidate was at the time of his election a person disqualified for election.

Rule 4 of the Election Petition Rules 1954, insofar as it is relevant to this matter states:

4(1) An election petition shall contain the following statements:

(a) …

(b) it shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

(2) …..

(3) ….

(4) The following form, or one to the like effect, shall be sufficient.

In *Chong Thain Vun v. Watson & Anor Hamid Datun v. Majanggil & Anor Richard E. Yap v. Tun Datu Mustapha bin Datu Harun* [1968] 1 MLJ 65 at p. 73, His Lordship Lee Hun Hoe J (as he then was) explained:

> The question whether the legislature intends a provision to be mandatory or directory must depend in each case on the scope and object of the enactment. Further it is necessary to look at the general scheme of the statute and its express provisions.

In *K. T. K. Thangamani And Another v. The Chief Secretary, Government Of Madras, And Another* AIR [1965] Madras 225, Anantanarayanan J for the Supreme Court said:

> Though the question whether a statute is mandatory or merely directory depends on the intention of the legislature, as could be gleaned from the language used, it is not the language which is conclusive, or all important. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision but also by considering its nature, its design, and the consequences which would follow from construing it the one way of the other. The use of the word "Shall" *prima facie* supports an inference of the mandatory nature of the statute, but it is not conclusive and the court has to ascertain the real intention of legislature.

I am of the view that where it is viewed contemporaneously in the context of the other provisions of the Act and r. 4 of the Election Petition Rules 1954 confirms not only the intention of the legislature to expedite the early determination of election petition but also to prevent any injustice on the defending candidates, whose election is being challenged, against unspecific and unforeseen allegations from irresponsible challengers. Likewise, it is also the object of the election law to equip successful candidates with early notice of the objection and allegation against them so that they might marshal their facts and preserve his evidence in anticipation of the judicial hearing. (see *Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor Daud bin Jusoh v. Annuar bin Haji Musa & Anor. Mohd Nor bin Ismail v. Mohd Zain bin*

Abdullah & Anor. [1988] 2 MLJ 384). Consequently, the courts have clearly and consistently ruled that the statutory requirements in r. 4(1)(b) of the Election Petition Rules 1954 is mandatory (see P*atau Rubis @ Dr. Patau Rubis v. Patrick Anek Uren & Anor* [1984] 1 CLJ 51 at p. 54; *Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor Daud bin Jusoh v. Annuar bin Haji Musa & Anor. Mohd Nor bin Ismail v. Mohd Zain bin Abdullah & Anor.* [1988] 2 MLJ 384). I find that that rule enacts in peremptory language that the petition shall state the facts and grounds relied on to sustain the prayer. The word "shall" has been used four times in it. This requirement is further repeated under para. 3 of the specimen form shown in sub rule (4). Although this rule is not couched in similar terms as s. 83 of the Indian Representation of the People Act 1951 which reads as:

> Section 83 of the Indian Act reads:
>
> 83. Contents of Petition
>
> (1) Shall contain a concise statement of material facts on which the petitioner relies.

I am however of the view that the true purport and effect of it is similar to that Indian Act 1951. As the local election cases does not provide any sufficient guidance as to what precisely the phrase "shall briefly state the facts and grounds relied on to sustain the prayer" mean, I have therefore adverted to a number of Indian Supreme Court decisions, mindful though of the differences in the wordings of the Indian election law with that of our own local jurisprudence, to draw parallel on the proper interpretation ascribed to that section. There are a plethora of India Supreme Court decisions which have time and again ruled that the requirements of s. 83 is mandatory and I do not wish to dwelve on a point that has been espoused in such clear terms. In explaining the meaning of the s. 83 of the Indian Act, in the case of *Samant N. Balakrishna v. George Fernandez And Other AIR* [1969] SC 1201 at p. 1212, Hidayatullah CJ said:

> The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars. The word material shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad.

In *Hardwari Lal v. Kerwal Singh* AIR [1972] SC 515 at p. 520, Ray J said:

> Material facts are facts which if established would give the petitioner the relief asked for. If the respondent had not appeared could the Court have given a verdict in favour of the election petitioner. The answer is in the negative because the allegation in the petition did not disclose any cause of action.

The Indian Courts have also explained in other cases the words "material facts" to mean what is necessary for the purpose of formulating a complete cause of action and the failure to plead which would render the pleading to be struck out under the rules of pleadings. (see *Keshav Prasad v. A.D. Mani* [1961] DEC 133 (MPHC); *H.V. Kamath v. Election Tribunal* AIR [1958] MP 168; *Manubhai Nandlal Amersey v. Popotlal Manilal Joshi* [1968] 3 SCR 217). In this connection it is only appropriate to refer to the case of *Leonard v. Nachiappa Chetty* [1923] 4 FMSLR 225 at p. 269 where it was pointed out and which was also referred in *Muip bin Tabib v. Dato' James Wong, Wan Hamid bin Tuanku Surur v. Francis Loke* [1971] 1 MLJ 246 where it was observed:

> Decisions of Indian Courts are of course not binding here but they are very valuable guides and have always been treated with the greatest respect by the courts in this country. Putting the matter at its lowest it can at least be said that due weight should be given to them when it is found that they are based on reasoning that commends itself to the court.

In *Public Prosecutor v. Anthony Wee Boon Chye & Anor.* [1965] 31 MLJ 189 at p. 194, Thomson LP said:

> Before departing from the case something should be said of the Indian case of *State of Madras v. Menon, supra,* for, although not binding on us, any judgment of the Supreme Court of India must always be regarded as of very great persuasive value.

It can thus be gleaned from the aforementioned cases the following propositions on the true purport and spirit of rr. 4(1)(b) and 4(3) of the Election Petition Rules 1954 that is:

(1) state a concise statement of material facts and then the fullest possible particulars;

(2) omission of a single material fact leads to an incomplete cause of action and the petition becomes bad;

(3) the function of particulars is to present in full a picture of the cause of action to make the opposite party understand the case he will have to meet;

(4) material facts and particulars are distinct matters. Material facts will mention statement of fact and particulars will set out the names of persons with the date, time and place;

(5) material facts will show the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action;

(6) in stating the material facts it will not do merely to quote the words of the section because then the efficacy of the material facts will be lost;

(7) an election petition without the material facts is no election petition at all. A petition which merely cites the section cannot be said to disclose a cause of action.

However, it must be noted that r. 4 of the Election Petition Rules 1954 merely provides for the general mandatory requirements of pleadings of an election petition. The facts and grounds to be stated in the petition therefore must comply with the specific requirements of s. 32 of the Election Offences Act, 1954 for that is the law that provides the launching pad of an election petition. The requirements of s. 32 of the Election Offences Act, 1954 thus is of paramount importance and must be adhered to strictly and failure to comply with it will render the petition defective. (see *Tengku Korish v. Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6 at p. 7; *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261; *Chong Thain Vun v. Watson & Anor Hamid Datun v. Majanggil & Anor Richard E. Yap v. Tun Datu Mustapha bin Datu Harun* [1968] 1 MLJ 65; *Muip bin Tabib v. Dato' James Wong, Wan Hamid bin Tuanku Surur v. Francis Loke* [1971] 1 MLJ 246 and *Zulkarnaini bin Mohamed Noor v. Syed Omar bin Mohamed & Anor*. [1979] 2 MLJ 143).

I shall now insofar as it is relevant to the present case deal with the mandatory requirements of each of the proviso stated in s. 32 of the Election Offences Act 1954.

Section 32 Proviso (a)

Where a petition is grounded on s. 32(a) it requires the following facts and grounds to be stated:

(a) General bribery, general treating or general intimidation.

It is imperative for the petitioner to identify the precise class of the offence, namely, whether it is general bribery, general treating or general intimidation. Part III of the Election Offences Act 1954 which deals with corrupt practices provides specific definition of these offences. The petitioner must identify in clear and specific terms the relevant charge/ charges against the third respondent. The facts which constitutes a corrupt practice must be stated and the facts must be correlated to one of the heads of corrupt practice. It is not sufficient for the petitioner to merely

state/allege the general class of the offence without sufficiently particularising the charge. The gravamen of the charge must be set out with exactitude and precision. Part III of the Election Offences Act 1954 and specifically ss. 7 to 10 contains many different offences and it is incumbent on the petitioner to identify the exact offence and allege them with sufficient facts and particulars in the petition. Section 11 of the Election Offences Act, 1954 defines and prescribes the punishment for a corrupt practice, which by sub-section (1)(b) thereof includes the offence of bribery and s. 10 of the Election Offences Act, 1954 provides that the persons specified therein shall be deemed guilty of the offence of bribery in the circumstances enumerated in that matter.

The necessity of clear and precise allegation to support a plea of corrupt practice was emphasised in *Harish Chandra Bajpai v. Triloki Singh*, 12 Election Laws Reports 461; AIR 1957 SC 444. An election petition without the material facts relating to a corrupt practice is no election petition at all (see *Hardwari Lal v. Kerwal Singh* AIR [1972] SC 515) and a petition which merely cites the section cannot be said to disclose a cause of action. This is to enable the third respondent to know what exactly is being alleged against him and to prevent him from being taken by surprise. Additionally, it will ensure that the respondent is not prejudiced and/or embarrassed in the conduct of his defence.

(b) that the offence/s in paragraph (a) above have so extensively prevailed. Facts and particulars to show how extensively this prevailed must be furnished in the petition.

(c) that as a result of paragraphs (a) and (b) it may be reasonably supposed to have affected the result of the elections. The petitioner is obliged to furnish facts and particulars to show that the extensive prevalence of matters adumbrated in paragraph (a) above more probable than not have affected the result of the election. (see *Hamad bin Mat Noor v. Tengku Sri Paduka Raja Ibrahim Ismail & 2 Ors* [1993] 4 CLJ 135).

Section 32 Proviso (c)

Where an election petition is grounded under this proviso, it must state and contain the following:

(1) That a corrupt or illegal practice was committed in connection with the election. Instances of corrupt practices are set out extensively in Part III of the Election Offences Act, 1954, whilst illegal practices are set out in Part IV of the Election Offences Act 1954 and these class of offences are separate and distinct. In *Abdul Rahman bin Ghazali v. Annuar bin Musa & 1 Lagi vide*

P.P. 33-7-95, His Lordship Azmel J has succinctly summarised the actual requirement of the phrase 'brief' in r. 4(1) of the Election Rules 1954 as follows:

> It must be pointed out that brevity within the meaning of Rule 4(1)(a) of the said Rules does not mean that one can omit clarity … An allegation of corrupt practice under the Election Offences Act must contain clearly all the material particulars and essential ingredients of the alleged corrupt practice in the petitions. Failure to do so would render the petitions to be struck out. The same requirements shall also apply in an allegation of illegal practice under the same Act.

(2) Therefore it is incumbent upon the petitioner to identify the relevant class and specific offences within that class that he alleges the respondent has committed. He must then furnish relevant material facts and particulars to make out the specific charge against the respondent so that he is not embarrassed and/or prejudiced. The charge must name the relevant and specific section in Part IV of the Election Offences Act, 1954 and preferably comply with the requirements stipulated in Chapter XVII of the Criminal Procedure Code relating to framing of a charge in a criminal proceeding. Where the petitioner adopts this course then he need only state the brief facts that will sustain the indictment bearing in mind the relevancy provisions in the Evidence Act 1950;

(3) the petitioner must clearly identify the person who he alleges have committed the offence adumbrated in paragraph (1) above. It may have been committed either by the candidate himself; or by someone else with the candidates' knowledge or consent; or by any of the agent of the candidate.

A perusal of Petitions 1 and 3 where both petitioners have alleged that the respondents violated s. 4A by promoting feelings of ill will and hostility and exerted undue influence as specified in s. 9 and committed acts of bribery as stated in s. 10 of the Election Offences Act 1954, clearly shows that they have failed to comply with the mandatory requirements of s. 32(a) and (c) of the Election Offences Act 1954 read with rr. 4(1)(b) and 4(4) of the Election Petition Rules 1954. The petitions failed to identify and/or specify with clarity the exact offence amongst the various offences stipulated in ss. 4A and Part IV of the Election Offences Act 1954 alleged to have been committed by the respondents. They have also failed to provide sufficient particulars to sustain their allegation. It is no part of the duty of the election judge or the respondent to embark on an enquiry as to what is the likely offence/s that the respondents may have committed. The conduct of the petitioner is akin to casting the net wide in the hope that they might strike with either one and this is something that this court will not condone. An allegation of corrupt practice is of a quasi criminal nature in as much a finding of corrupt practice entails penal

consequences. (see *Gurdial Singh Nijar v. KS Balakrishnan* [1993] 2 CLJ 75). The seriousness of the allegation warrants one to be sure beyond doubt and to be in possession of clear and cogent facts and particulars before placing such an allegation on record. The onus is on the petitioners to establish corrupt practice beyond reasonable doubt by evidence which is clear, unequivocal and unambiguous. (see *Re Pengkalan Kota Bye-election Teoh Teik Huat v. Lim Kean Siew & Anor* [1981] 1 MLJ 265 and *Wong Sing Nang v. Tiong Thai King* [1996] 4 MLJ 261). The prerequisite for this is obviously the need to plead in the petitions clear, unequivocal and unambiguous facts and particulars but not evidence of course as may have been misunderstood and emphasised by learned counsel for the petitioners that the respondent are in fact seeking for evidence to be pleaded in the petitions which is not what the respondent have complained.

I find that the facts and particulars furnished by Petitions 1 and 3 to sustain these allegations are cursory and bereft of any particular details. The respondents cannot be expected to have sufficient notice of what is that they must exactly explain or defend. The respondents will surely be embarrassed and/or prejudiced in the conduct of their defence. Reading para. 4.3 in Petition 1 and para. 4.5 in Petition 3 one will search in vain to find out as to what the precise allegations against the respondents are. One will have to speculate, guess, conjecture and hazard as to what separate and independent forms of corrupt practice is being alleged. On this ground alone the relevant paragraphs in Petition 1 ie, para. 4.3 and Petition 3 ie, para. 4.5 respectively shall be struck out. Further, para. 4.5(i) in Petition 3 is particularly embarrassing as it is merely a verbatim reproduction of the Bahasa version of s. 10(a) of the Election Offences Act 1954. No attempt whatsoever was made to comply with the mandatory requirements of both ss. 32(a) or (c) of the Election Offences Act 1954 read with r. 4 of the Election Petition Rules 1954. A petition which merely cites the sections cannot be said to disclose a cause of action and is no election petition at all. (see *Hardwari Lal v. Kerwal Singh* AIR [1972] SC 515). In addition to these fundamental defects, the petitioners failed to provide facts and particulars to show the extent to which the offences of general bribery, general treating and general intimidation were prevalent. More importantly the petitions failed to demonstrate how if at all the aforementioned offences were prevalent or if have been committed may be reasonably supposed to have affected the result of the election. In *Gunn v. Sharpe* [1974] 2 All ER 1058 at p. 1063, Willis J referred to the case of Hockney Case, *Gill v. Reed & Holmes* [1874] 31 LT 69 at p. 71-72, Grove J said:

> … *An election is not to be upset for an informality or for a triviality … The objection must be something substantial, something calculated really to affect the result of the election … the judge is to look to the substance of the case* and to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial *effect upon the election.* (emphasis added)

The petitioner in an attempt to salvage their defective pleading sought to rely on r. 5 of the Election Petition Rules 1954 which reads:

> 5 Evidence need not be stated in the petition, but the Judge may, upon application in writing by a respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial upon such terms as to costs and otherwise as may be ordered.

I do not see how this rule can save the petitioners' pleadings. This rule becomes relevant only when the petitioner complies with r. 4(1)(b) read with r. 4(4) of the Election Petition Rules 1954. As explained above the petitioners failed to meet the mandatory requirements of r. 4 of the Election Petition Rules 1954 and under the circumstances, it will be unfair if the onus is shifted on the respondents to make the application for such particulars. The respondents must at least know what is that they have to request and this will be made easy if the petitioners, in the first place, have met with the strict requirements, of r. 4 of the Election Petition Rules 1954. In addition to this fundamental defects, the petitioners have also failed to provide facts and particulars to show the extent to which the offences of general bribery, general treating and general intimidation were prevalent. And more importantly the petitions failed to demonstrate how if at all the aforementioned offences were prevalent or if have been committed may be reasonably supposed to have affected the result of the election. In *Phillips v. Phillips And Others* [1878] Vol IV QBD 127 at 130:

> … the proper course for the plaintiff to have adopted would have been to set forth the purport of the document, and then the document could be looked at and the question decided. To my mind, therefore, it is demonstrative that this pleading is embarrassing and not according to the rules. … *it is abundantly, to my mind, demonstrative that the pleader has not pleaded as he ought to have done according to the rules.* (emphasis added)

> … Instead of driving the defendants to ask for particulars of the statement, which I think is a most objectionable proceeding, what the plaintiff ought to have done, on this objection being made, would have been to produce an affidavit shewing how matters stood, and asking that the summons to amend these pleadings might be adjourned until he got discovery; … *I have always*

said a plaintiff cannot be permitted to go to trial and say that he was entitled to a sum of money, but that he cannot give the defendant any particulars of it….. that have been framed for making them clear and distinct, on the surmise that there may be a difficulty in stating that which the rules require … (emphasis added)

… It is manifest on this statement, and not a word has been said in justification of it, that the plaintiff in the alternative alleges that he is entitled to the lands under various Crown grants. What possible justification is there for that? …

… has omitted to state the facts which he ought to have stated, and the facts on which he will have to rely at the trial if he has any case … the same time leaving out the particular facts which would give the defendants the knowledge of what the plaintiff's case is.

… I think it quite clear that the present statement is wholly insufficient … The distinction is there pointed out that every pleading shall contain a statement of the material facts on which the party pleading relies, but not the evidence by which they (that is, those material facts) are to be proved. The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts … (emphasis added)

… If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings. *Therefore, again, in their pleadings they ought to state every fact upon which they must rely to make out their right or claim.* (emphasis added)

… But if he has no such admission or evidence, and does not know that the deed is under which he is about to claim, that is, saying, in other words, that he does not know what his claim is. If he does not know what his claim is he has no right to make a statement of claim at all. The plaintiff has made a general statement which prevents the defendant from demurring, and at the same time the omission of the facts prevents the defendant from knowing what the plaintiff's case is, and therefore prevents them from knowing how to meet it …

… it so states the plaintiff's case as to embarrass the defendants in preparing their defence at the trial of the action …

… would be likely to take the opposite party by surprise. *The plaintiff must state the facts which are material for the purpose of enabling the defendant to go to trial,* knowing what the issue he really has to meet is, and what is the question between him and the plaintiff, so that he may not be there taken by surprise, and the real question between the parties fail to be decided in consequence of insufficient allegations of the plaintiff … (emphasis added)

a … this statement of claim in no way enables the defendants to know what case they have to meet at the trial of this action … Then the defendants will fairly and reasonably know what they have to meet. I do not mean to give that as the form in the present case because we do not know any of the facts. We cannot possibly tell what facts are material to be stated, unless we really know what the case of the plaintiff is – which, as he has carefully kept all the facts and particulars out of the pleading, we cannot even guess at … *it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.* (emphasis added)

c … If the plaintiff is doing anything more than merely guessing that by possibility he may make out his title to this estate, he must know something about it sufficient to enable him to state the facts on which he thinks the possession of this estate must come to him …

In *Samant N. Balakrishna v. George Fernandez And Others* AIR [1969] SC 1201 at p. 1212

d The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between *material facts* and *particulars*? The word *'material'* shows, that the *facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct.* Thus the *material facts* will mention that a statement of fact (which must be set out) was made and it must be alleged that it refers to the character and conduct of the, candidate that it is false or which the returned candidate believes to be false or does not believe to be true and that it is calculated to prejudice the chances of the petitioner. In the particulars the name of the person making the statement, with the date, time and place will be mentioned. The *material facts* thus will show the ground of corrupt practice and the complete cause of action and the *particulars* will give the necessary information to present a full picture of the cause of action. In stating the *material facts* it will not do merely to quote the words of the section because then the efficacy of the words 'material facts' will be lost. The fact which constitutes the corrupt practice must be stated and the fact must be correlated to one of the heads of corrupt practice. Just as a plaint without disclosing a proper cause of action cannot be said to be a good plaint, so also an election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections cannot be said to disclose a cause of action where the allegation is the making of a false statement. That statement must appear and the particulars must be full as to the person making the statement and the necessary information.

… the statutory requirements of the law of Election in India must be strictly observed. It is pointed out in that case that an election contest is not an action at law or a suit in equity but a purely statutory proceeding unknown to common law and that the Court possesses no common law power … (emphasis added)

Section 32 Proviso (b)

An election can be avoided on this ground if the following conditions are satisfied:

(1) The election was not conducted in accordance with the principles laid down in any written law relating to the conduct of any election; and

(2) that such non-compliance affected the result of the election.

Both the requirements must be satisfied before an election can be avoided. This has been clearly espoused by His Lordship Abdul Hamid bin Hj. Mohamed J (now Federal Court Judge) in a very illuminating judgment in *Ang Thye Chin v. Chua Kow @ Chua Kow Eng & 2 Ors.* [1996] 1 CLJ 49. At p. 60 of the judgment His Lordship after undertaking a painstaking exercise of examining all the local and English election cases on the correct interpretation of s. 32(b) of the Election Offences Act 1954, aptly summarised the requirement of that section in the following way:

Jadi kesimpulannya dalam penghakiman saya, di bawah section 32(b), pemilihan seseorang calon dalam, sesuatu pilihanraya itu hendaklah diisytiharkan sebagai batal jika Hakim Pilihanraya berpuashati bahawa kerana ketakpatuhan peruntukkan-peruntukkan mana-mana undang-undang bertulis berhubung dengan pilihanraya, pilihanraya itu telah tidak dijalankan mengikut prinsip-prinsip yang ditetapkan di dalam undang-undang bertulis dan bahawa ketidakpatuhan itu telah menyentuh keputusan pilihanraya itu.

Before I proceed to set out the pleading requirements of s. 32(b) of the Election Offences Act 1954, I must deal with one other matter raised by the Honourable Attorney General which is of relevance and important to determine the petitions and to distinguish the cases which were decided prior to the amendment to s. 32(b) of the Election Offences Act 1954. The Honourable Attorney General has pointed out that the words "conduct of" in s. 32(b) of the Election Offences Act 1954 which precedes the phrase "any election" was conspicuously absent in the old section and that those words in the present s. 32(b) of the Election Offences Act 1954 is a recent addition by way of an amendment *vide* Act A 1177/02 which came into force on 16 January 2003.

For easy reference, it is convenient to reproduce both the old and new provision of s. 32(b).

Section 32

The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:

Old provision

(b) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

New Provision

(b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

It would appear that the old s. 32(b) of the Election Offences Act 1954 can accommodate non-compliance of any form so long as it is a written law relating to any election. Thus matters that fall within the ambit of s. 32(a), (c), (d) and (e) can also be brought under the old s. 32(b) of the Election Offences Act 1954 where a petitioner fails to succeed under any of the abovementioned provisos. There is nothing to preclude the petitioners to establish his case under s. 32(b) of the Election Offences Act 1954. The old s. 32(b) of the Election Offences Act 1954, therefore, appeared to have accommodated all kinds of non-compliance and also served as a "dustbin category" for a petitioner to attempt to fit his allegations of non-compliance of any written law 'relating to any election' where they failed to do so under the provisos in s. 32 of the Election Offences Act 1954.

On the other hand, the new s. 32(b) of the Election Offences Act 1954 restricts the operation of this section to non-compliance of any written law that relates specifically to the 'conduct of any election'. The new section is narrower in that it can only be invoked if the petitioner can show that there has been non-compliance of the provisions of the Elections (Conduct of Elections) Regulations 1981 specifically or more generally other written law that governs only the conduct of the election. Thus, previously a petitioner is entitle to invoke this section and/or s. 32(c) of the Election Offences Act if he can show that the respondent has committed the offence of bribery contrary to s. 10 of the Election Offences Act 1954. Under the new provision, however, he is constricted to only s. 32(c) of the Election Offences Act 1954 as the new provision to s. 32(b) of the Election Offences Act 1954 only deals with 'the conduct of election' and the allegation of non-compliance of s. 10 of the

Election Offences Act 1954 will not be such a case. In the light of the interpretation that I have adopted and from a perusal of the cases decided in the past on the requirements of s. 32(b) of the Election Offences Act 1954 the following points of principle can be gleaned and summarised as follows:

The petitioner when presenting an election petition under s. 32(b) of the Election Offences Act 1954 must:

(1) Refer to the specific written law (see *Muip bin Tabib v. Dato' James Wong, Wan Hamid bin Tuanku Surur v. Francis Loke* [1971] 1 MLJ 246) 'relating to the conduct of any election' which he alleges the respondents failed to comply. The petition must not only narrate the facts complained of but must relate or associate the complaints with the provisions of the election laws relating to the conduct of any election that the respondents is alleged to have transgressed. (see *Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor Daud bin Jusoh v. Annuar bin Haji Musa & Anor. Mohd Nor bin Ismail v. Mohd Zain bin Abdullah & Anor.* [1988] 2 MLJ 384 at p. 388; *Mohamed Jaafar v. Sulaiman & Anor* [1970] 1 MLJ 18; *Isahak Hamid v. Mustapha* [1965] 2 MLJ 18 and *Zulkarnaini bin Mohamed Noor v. Syed Omar bin Mohamed & Anor*. [1979] 2 MLJ 143).

(2) There must be clear allegation that the result of the election has been affected. The principal ingredient of the ground in s. 32(b) of the Election Offences Act 1954 is that the result has been affected and not that there had been non-compliance with the provisions of the Act or the rules. (see *Ram Abhilakh Tewari v. The Election Tribunal, Gonda & Ors* AIR [1958] All 663). This view of the matter is further supported by His Lordship Rigby J (as he then was) in *Re Election Petition of Cheah Seng Teik* where His Lordship stated:

> It is to be noted that mere non compliance with the provisions of such written law is not, by itself, sufficient to avoid the election; the non compliance must have affected the result of the election.

In *Muip bin Taib v. Dato' James Wong, Wan Hamid bin Tuanku Surur v. Francis Loke* [1971] 1 MLJ 246, it was held that the election petitions were defective as neither of them alleged non compliance with the provisions of any written law relating to the election nor was there any allegation that the result of the election had been affected. (see *Raja Ahmad bin Raja Sulaiman v. Haji Mohd Daud bin Ja'afar & Anor Election Petition No: 33-3-1995* and *Ang Thye Chin v. Chua Kow @ Chua Kow Eng & 2 Ors.* [1996] 1 CLJ 49). In *Bong Geok Beng v. Ahmad Nordin bin Mohamed Amin & Anor* [1980] 1 MLJ 167, His Lordship Wan Yahya J (as he then was) reiterated this requirement where he stated:

> Section 32 of the Election Offences Act, 1954 requires the petitioner not only to state specifically in his petition which provisions of the law on which non compliance is alleged to have taken place but also to supply adequate information as to how the respondent is said to have offended the law. (emphasis added)

And at p. 169, His Lordship explained the rationale for this requirement:

> In a more colloquial language this election trial is like a card game; at the expected time each player has to place his cards on the table so as to determine his position in accordance with the rules of the game. Once the cards are on the table no change of mind is tolerated. If allowed, it will not only prevent proper determination of the game but will precipitate confusion and chaos.

In the absence of such an allegation this court has no jurisdiction to enquire into the allegation made. (see *J. Devaiah v. Nagappa* AIR [1965] Mysore 102 at p. 106; *Savithri Devi v. Prabhawathi Misra* 15 ELR 358 (All).

(3) There appears to be a conflict of opinion as to whether s. 32(b) of the Election Offences Act 1954 must be specifically mentioned in the petition or whether it suffices if the wordings in that section is substantially reproduced.

In *Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor Daud bin Jusoh v. Annuar bin Haji Musa & Anor. Mohd Nor bin Ismail v. Mohd Zain Bin Abdullah & Anor.* [1988] 2 MLJ 384 at p. 387, His Lordship Wan Yahya J (as he then was) was of the view that it is not obligatory for a petitioner to assert verbatim under which section and paragraph his petition is grounded. He may use words to the like effect without citing the actual section or paragraph. However, in *Norbert Choong Kai Chong & Anor v. Mohamed Idris bin Haji Ibrahim & Anor* [1980] 1 MLJ 316, His Lordship Harun J (as he then was) held that an omission to state s. 32(b) of the Election Offences Act 1954 in the petition was fatal. (see also *Mohamad Hanafi bin Seman v. Wan Othman bin Wan Yusoff & Ors* [2000] 3 CLJ 811). On this matter, I am with respect inclined to follow the opinion expressed in *Norbert*'s case. The whole of s. 32 is couched in mandatory terms and therefore it is equally important for the petitioner to state clearly the exact proviso under that section which he is relying. If the petitioner can substantially reproduce the wordings of that section or words to the effect, it should be equally easy and convenient for him to state the numeric of the section.

I shall now consider whether the petitioners have complied with the requirements as envisaged by s. 32(b) of the Election Offences Act 1954. On the allegation that the respondents had illegally extended the polling time in contravention of regs. 11(5) and 3(3) of the Elections (Conduct of Elections) Regulations 1981, I am satisfied that all the petitioners have complied with the first requirement in s. 32(b) of the Election Offences Act 1954 read with r. 4(1)(b) of the Election Petition Rules 1954 in that they contain sufficient facts and grounds of the alleged non-compliance. The allegations of fact that the time for polling was extended beyond the gazetted time for two hours is not in dispute and were not denied by the respondents so as to render it unnecessary to call witnesses to support. I am of the view that although the respondents have not shown any authority or provision of the election laws which empowers the returning officer or the election commission to extend time without complying with the express stipulated relevant procedure of election laws, it cannot be disputed that the extension of time was not in accordance with the election laws as stipulated under the Election Offences Act 1954 and under the Election Petition Rules 1954. On the other hand, the mere fact there is transgressions of the Election Law in extending the time for polling against the gazetted time does not automatically or necessarily affect the result of the election and the petitioner must show in their petition how that extension of time have affected the result of the election. However, the petitions lack facts and particulars in terms of the second requirement in that it failed to disclose how the fact of the alleged non-compliance would have affected the result of the election. This has been the view on the Election Laws which generally have been recognised and acted upon by election judges who have dealt with election petitions. In the instant case, the petitioners have failed to demonstrate how the transgressions of the Election Laws as alleged has affected the result of the election. (see *Hansen v. Australian Electoral Commission* [2000] FCA 606; *Singh Ram & Anor v. Duli Chand & Anor DEC* and *Moinuddin B. Harris v. B.P. Divgi ELR*).

Similarly, on the allegation that second respondent in Petition 1 failed to maintain secrecy of voting and thereby contravened ss. 4(g), 5(2) and (3) of the Election Offences Act 1954 and regs. 17, 19(2) and (3) of the Elections (Conduct of Elections) Regulations 1981 and also that the second respondent failed to comply with reg. 17(3) of the Elections (Conduct of Elections) Regulations 1981 which concerns with the format of the ballot paper, I am satisfied that the petitioner has met the first requirement of s. 32(b) but however has failed to comply with the second requirement for the same reasons that I have adumbrated above, that is, it had failed to disclose how the fact of the alleged non-compliance would have affected the result of the election. At this juncture, it is only appropriate to state by way of an observation that

the appropriate authorities should take all necessary and appropriate measures to ensure that the principle of the secret ballot is respected and that voters are able to cast their ballots freely, without fear or intimidation and voters are guaranteed the free expression of their will. Nevertheless, in so far as in the instant case, the petitioner as stated above has failed to disclose or demonstrate how the non-compliance has affected the result of the election.

As to the allegation that the third respondent in Petition 1 had during election made and published false statement of fact by using the title "professor" and thereby contravened s. 11(1)(d) and (e) of the Election Offences Act 1954, I am satisfied that the petitioner failed altogether to meet with the mandatory requirements of r. 4(1) of the Election Petition Rules 1954 read with s. 32(b) of the Election Offences Act 1954 for reasons that I have alluded above, that is, it had failed to disclose how the fact of the alleged non-compliance would have affected the result of the allegation.

In respect of the allegation that the second respondent in Petition 3 transferred voters without consent and thereby contravened reg. 12 of the Conduct of Elections (Registration of Voters) Regulation 2002, I am satisfied that the petitioner failed to meet in totality the requirements of r. 4(1) of the Election Petition Rules 1954 read with s. 32(b) of the Election Offences Act 1954.

As to the allegation that the first and second respondents in Petitions 2 and 3 failed to comply with reg. 14A of the Elections (Conduct of Elections) Regulations 1981 which relates to the use of an authoritative text of electoral rolls, the petitioners clearly omitted compliance with the strict requirements of r. 4(1) of the Election Petition Rules 1954 read with s. 32(b) of the Election Offences Act 1954.

Section 32 Proviso (e)

To succeed on this ground under s. 32(e) of the Election Offences Act 1954 the petitioner must provide facts and particulars that will show the disqualification of the returned candidate. The grounds for disqualification as a member of the State Legislative Assembly and Member of Parliament can be found in the State Constitution and the Federal Constitution respectively.

Article 64(1)(c) of the Selangor State Constitution, 1959 states:

> Subject to the provisions of this Article a person is disqualified for being a member of the Legislative Assembly if:
>
> (c) he holds an office of profit;
>
> or
>
> (d) …

Section 6(1)(c) of the Eighth Schedule to the Federal Constitution states:

> Disqualification for membership of Legislative Assembly
>
> 6(1) Subject to the provisions of this section, a person is disqualified for being a member of the Legislative Assembly if:
>
> (c) he holds an office of profit;

The Constitution of Selangor does not define what amounts to "office of profit". However, art. 1 of the Constitution states:

> This laws may be cited as the Laws of the Constitution of Selangor, 1959 and shall be in such Parts as herein provided and shall be read subject to the Federal Constitution and shall come into force on 1st day of April, 1959.

Article 160 Federal Constitution defines "office of profit" as follows:

> "Office of Profit" means any whole time office in any of the public services and includes:
>
> (a) the office of any judge of the Federal Court, of the Court of Appeal or of a High Court; and
>
> (b) the office of Auditor General; and
>
> (c) the office of a member of the Election Commission, of a member (other than an *ex officio* member) of a Commission to which Part X applies, or of a member (other than an *ex officio* member) of any corresponding Commission established by the Constitution of a State; and
>
> (d) any other office not specified in Clause (3) of Article 132 which may be declared by Act of Parliament to be an office of profit;

In the case of *Lee Hie Kui @ Eric Lee v. Song Swee Guan & Anor* [1998] 1 CLJ Supp 191, His Lordship Ian Chin J in considering the definition of "office of profit" stated that the Indian case law were irrelevant because the term "office of profit" is not defined in the Indian Constitution or in the Representation of the People Act 1951, whereas 'office of profit' is defined in our Federal Constitution. His Lordship also went on to state that to qualify for 'public service', reference must be made to the Constitution of each State. Following that case, it is clear that any interpretation of "office of profit" must only be resorted to the Federal Constitution itself. On proper interpretation of art. 160 of the Federal Constitution, "office of profit" necessarily denotes any whole time office in any of the public services as defined in art. 132 of the Federal Constitution, and on the basis of the latin maxims, *expressio unius est exclusio alterius* and *expressum facit cessare tacitum excludes* any part time office of a transient nature.

Article 48 of the Federal Constitution deals with disqualification for Membership of Parliament. Article 48 reads:

> 48(1) Subject to the provisions of this Article, a person is disqualified for being a member of either House of Parliament if:
>
> (a) he is and has been found or declared to be of unsound mind; or
>
> (b) he is an undischarged bankrupt; or
>
> (c) he holds an office of profit; or
>
> (d) having been nominated for election to either House of Parliament or to the Legislative Assembly of a State, or having acted as election agent to a person so nominated, he has failed to lodge any return of election expenses required by law within the time and in the manner so required; or
>
> (e) he has been convicted of an offence by a court of law in the Federation (or, before Malaysia Day, in the territories comprised in the State of Sabah or Sarawak or in Singapore) and sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand ringgit and has not received a free pardon; or
>
> (f) he has voluntarily acquired citizenship of, or exercised rights of citizenship in, any country outside the Federation or has made a declaration of allegiance to any country outside the Federation.

The petitioner in Petition 1 has alleged at para. 4.5 in the petition as follows:

> Pempetisyen menyatakan bahawa Responden Ketiga adalah seorang yang tidak layak dicalonkan sebagai calon pilihan raya N.26 Bangi kerana pada masa dicalonkan Responden Ketiga masih belum meletak dari pekerjaannya selaku Sarjana Tamu di Institute Alam dan Tamadun Melayu (ATMA) …

Petitioner in Petition 2 has made bare allegation that the third respondent is disqualified by reason of holding an office of profit at the time of his election. Petition 2 also goes on to allege that the third respondent failed to state "tiada" when asked to state his occupation in the nomination form. The third respondent merely marked "–". To my mind this by no stretch of imagination can constitute a fact of disqualification within the meaning of art. 64(1)(c) of the Selangor State Constitution read with s. 6(1) Eight Schedule of the Federal Constitution. Worse still the mark "–" is neutral and does not signify anything than can be construed as to amount to a fact that will constitute the disqualification of the third respondent. Section 62 of the Interpretation Acts 1948 and 1967 Act 388) states that:

> Any written law prescribing a form shall be deemed to provide that any instrument or other document purporting to be in that form shall not be invalidated by relation of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead." (see *Abdul Karim v. Mohamed Taib & Anor* [1969] 2 MLJ 72 and *Khoo Kay Por v. Ooi Ean Kwong & Anor*. [1980] 1 MLJ 92)

I find that the petitioner has shown complete disregard to the requirement of r. 4(1) of the Election Petition Rules, 1954 read with s. 32(e) of the Election Offences Act 1954 and that paragraph is devoid of any material facts or particulars to justify the fact of disqualification of the third respondent.

The petitioner in Petition 3 merely states that the third respondent has made a false declaration of his position as a Parliamentary Secretary. He failed to demonstrate how at all this would amount to a disqualification within the meaning of art. 48 of the Federal Constitution. This allegation is one which cannot be found in art. 48 of the Federal Constitution. Thus it is clear that all the petitions where it is grounded on s. 32(e) of the Election Offences Act 1954 either clearly lacks facts and particulars to support the fact of disqualification or in some cases failed to furnish any facts at all to sustain the fact of disqualification as required by the mandatory provisions of r. 4(1) of the Election Petition Rules 1954 read with s. 32(e) of the Election Offences Act 1954 or as a ground to avoid election. The petitioners have shown complete disregard to the requirement of r. 4(1) of the Election Petition Rules 1954 read with s. 32(e) of the Election Offences Act 1954. The paragraphs in the petitions which relate to the alleged disqualification of the respondents are devoid of any material facts or particulars to justify the disqualification of the third respondent.

I shall now deal with the objection of the second respondent in Petition 1 and first and second respondents in Petitions 2 and 3 respectively that the petitioners failed to comply with the mandatory requirements of r. 3(1) of the Election Petition Rules 1954 in that they have failed to leave 2 copies of the petition with the office of the registrar at the time of its presentation. In support of this objection the respondents filed two (2) affidavits Carian Rasmi which were affirmed by Cik Zureen Elina Hj. Mohd. Dom, a Federal Counsel from the Attorney-General's Chambers. The relevant parts in the said affidavits are:

> 1. Saya sesungguhnya menyatakan bahawa pada 28 Mei 2004 saya telah membuat carian rasmi ke atas fail kes ini di Pejabat Pendaftaran Sivil Mahkamah Tinggi Shah Alam. Sesalinan surat memohon kebenaran membuat carian rasmi yang diakui terima oleh Bahagian Pentadbiran Mahkamah Tinggi Shah Alam dikemukakan dan ditandakan di sini sebagai ekshibit "ZE-1".

2. Selanjutnya saya telah membuat carian rasmi lanjutan pada 2 Jun 2004 di tempat yang sama iaitu di Pejabat Pendaftaran Sivil Mahkamah Tinggi Shah Alam. Sesalinan surat memohon kebenaran membuat carian rasmi lanjutan yang diakui terima oleh Bahagian Pentadbiran Mahkamah Tinggi Shah Alam dikemukakan dan ditandakan di sini sebagai ekshibit "ZE-2".

3. Melalui carian rasmi dan carian rasmi lanjutan yang dibuat, saya mendapati bahawa terdapat satu sahaja salinan Petisyen Pilihan Raya yang ditinggalkan di pejabat Pendaftaran Mahkamah.

4. Saya sesungguhnya menyatakan bahawa maklumat-maklumat di atas adalah tepat dan benar berdasarkan carian rasmi dan carian rasmi lanjutan yang telah dilaksanakan.

The petitioners did not file any affidavit in reply to the said affidavits. However, on the day fixed for hearing, in reply to the respondents' objection, learned counsel for the petitioner sprang up on his feet and produced a copy of a letter from the firm of the petitioners' solicitors and which was addressed to the registrar of the High Court Shah Alam and he read the said copy of the letter from the Bar table. The letter as shown from the Bar table, and even if it is admissible it merely states that the petitioners' solicitors have filed 21 copies of the petition and requested the registrar to return 16 copies and retain 5 copies of the same. On the basis of this letter learned counsel for the petitioners argued that they have complied with the requirements of r. 3(1) of the Election Petition Rules 1954. It has been said time and again that the practice of making statements from the Bar should be discouraged particularly on such serious issues as this. In *Minister Of Labour, Malaysia v. Chan Meng Yuen And Another Appeal* [1992] 2 MLJ 337 at p. 342, His Lordship Harun Hashim SCJ, in delivering the judgment of the Supreme Court remarked:

> ... it was suggested by the learned senior federal counsel who appeared for the Minister that the policy decision was that as there is an alternative remedy available to the respondent to seek relief in the civil court the Minister has acted reasonably. *That may be so but the Minister has not said so and we cannot accept a statement from the Bar as being the reason the Minister had in arriving at his decision. We can only look at the facts as stated in the affidavits before this court.* (emphasis added)

The law reports are replete with cases on failure to reply to a material factual allegation in an affidavit and what will be the consequences of such a failure. In *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45, the Supreme Court ruled that "an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted." (see also *Overseas Investment Pte*

Ltd v. Anthony William O'brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82, *United Malayan Insurance Bhd v. Ng Chai Khoon Paul* [1992] 4 CLJ 2055; [1992] 3 CLJ (Rep) 753 and *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609).

Therefore, it is incumbent upon the petitioners to reply to the affidavits filed on behalf of the respondents and failure to controvert specifically to the factual averments in the said affidavits which has been raised as a ground for the preliminary objection and failing to comply both must operate to the detriment and is deemed acceptance by the petitioners. Hence it is clear from the affidavit 'Carian Rasmi', the petitioners have failed to leave two (2) copies of the petitions at the Registry at the time when they presented the petitions as required mandatorily by r. 3(1) of the Election Petition Rules 1954. I am of the view that the affidavits on 'Carian Rasmi' which were affirmed by Cik Zureen Elina Hj. Mohd. Dom Federal Counsel on behalf of the respondent can be considered in the preliminary objection proceedings to determine whether the petitioners have complied with r. 3(1) of the Election Petition Rules 1954. The contention of the learned counsel for the petitioners that the afidavits 'Carian Rasmi' cannot be considered is misplaced in law and ought to be rejected. I do not wish to dwelve on this issue any further, suffice for me to say that a failure to comply with the mandatory requirements of r. 3(1) of the Election Petitions Rules 1954 will render the petitions to be struck out as against the respondents. In this regard, I would adopt the reasoning of His Lordship Augustine Paul J (now Judge of the Court of Appeal) in *Dr Lee Chong Meng v. Abdul Rahman bin Haji Abdullah, Returning Officer & Ors (No. 2)* [2000] 3 CLJ 519 and *Ramely bin Mansor v. Suruhanjaya Pilihanraya Malaysia & Ors* [2000] 6 CLJ 56.

On going through the entire Election Laws, I am of the view that mere transgressions of the Election Laws does not necessarily affect the result of the election. The petitioner has to proceed one step further and comply with the mandatory statutory requirement and demonstrate how the transgression of the Election Laws as alleged has affected the result of the election and this has been the view on the Election Laws which generally have been recognised and acted upon by election judges who have dealt with election petitions. In the instant case, the petitioners have failed to demonstrate how the transgressions of the Election Laws as alleged has affected the result of the election.

For reasons aforesaid, I allowed the preliminary objection and accordingly I dismissed all the three petitions.

I hereby determine that:

(i) Amran bin Kasimin the third respondent in Petition No. 1/2004 was duly elected to the Selangor State constituency of N.26 Bangi;

(ii) Mohd Shamsudin bin Lias the third respondent in Petition No. 2/2004 was duly elected to the Selangor State constituency of N.8 Sungai Burung; and

(iii) Dato' Noh bin Omar the third respondent in Petition No. 3/2004 was duly elected to the Selangor Parliamentary constituency of P.95 Tanjong Karang.

Consequently, a certificate to this effect would be issued to the Election Commission as required under s. 36(2) of the Election Offences Act 1954. I also allowed costs to the first and second respondents for three counsels and to the third respondent for two counsels.